81-138

No. _____

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

CHANDLER UNIFIED SCHOOL DISTRICT; ANNA MARIE JACOBSON, BEN RUOTI, LYNN JONES, EDWARD BASHA AND BETTY BOGLE, IN THEIR CAPACITY AS MEMBERS OF THE BOARD OF EDUCATION OF THE CHANDLER UNIFIED SCHOOL DISTRICT; JAMES T. PERRY, IN HIS CAPACITY AS SUPERINTENDENT OF THE CHANDLER UNIFIED SCHOOL DISTRICT; AND HOWARD T. CONLEY, IN HIS CAPACITY AS PRINCIPAL OF CHANDLER HIGH SCHOOL, PETITIONERS,

v.

THERESA M. COLLINS, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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July 21, 1981

QUESTIONS PRESENTED

1. Whether a court of appeals decision prohibiting voluntary school prayers during optional school assemblies places impermissible overemphasis on the establishment clause of the first amendment to the detriment of the contravening policies of neutrality and accomodation underlying the free exercise clause.

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Constitutional Provisions:

United States Constitution, amendment 1 1

OPINION BELOW

The opinion of the Court of Appeals (App. A, infra) is reported at 644 F.2d 759. The opinion of the District Court for the District of Arizona is reported at 470 F. Supp. 959 (App. B, infra)

JURISDICTION

The judgment of the Court of Appeals (App. A, infra) was entered on May 4, 1981. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution:

amendment I.

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or

of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

STATEMENT OF THE CASE

Chandler High School is a public school in Chandler, Arizona. During the course of the school year, the student council schedules student assemblies that are held during regular school hours. To facilitate the assemblies the school's administration adjusts the regular class schedule. In addition, students not wishing to attend the assemblies may report to a supervised study hall.

During the 1977-78 school year, the student council initiated a plan to open its assemblies with a prayer. The council selected one member of the student body at random to lead a prayer. The selected student could choose the words and manner

of the prayer. The principal of Chandler High School approved of this activity with the knowledge and concurrence of the Superintendent of schools and the Board of Education. On each assembly day, the student council presented the principal with an agenda which stated whether or not a prayer would be included. The student council assemblies were opened with a prayer during the 1977-78 and 1979-80 school years.

During the spring of 1978, Theresa Collins, the lower-court plaintiff and mother of two students then enrolled in Chandler High School, challenged the constitutionality of the student council's voluntary prayers. Ms. Collins approached the Chandler school authorities and demanded the prayers be discontinued. The officials indicated, however, that they intended to continue permitting the stu-

dent council to open assemblies with a prayer. Shortly thereafter, the Maricopa County Attorney advised Chandler officials that prayers at student assemblies were permissible.

Ms. Collins commenced to file suit in the District Court of Arizona seeking an injunction against the prayers, a declaratory judgment, attorneys' fees and expenses. The first and fourteenth amendments to the United States Constitution served as the basis for federal jurisdiction allegations in the District Court. The District Court granted summary judgment for Ms. Collins, finding the Chandler Unified School District had violated the first and fourteenth amendments to the United States Constitution and issued an order permanently enjoining the district and its officials from permitting, authorizing, or condoning the saying of

public prayers by the students at the assemblies.

The school district appealed the grant of a permanent injunction to the Ninth Circuit and Ms. Collins cross-appealed a denial of fees. The Court of Appeals affirmed the District Court's decision that a violation of the establishment clause of the United States Constitution had occurred.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts With The Decisions Of The Other Courts Of Appeal, District Courts, And The Supreme Court, As To The Proper Interpretation Of The United States Constitution, Amendment I.

The court of appeals condemned Chandler Unified School District's benevolent neutrality toward the voluntary student-initiated prayers conducted at optional student council assemblies. The court reasoned that Chandler's conduct cannot be saved from constitutional attack merely because attendance at assemblies is voluntary, citing School District v. Schempp, 374 U.S. 203 (1963) and Engel v. Vitale, 370 U.S. 421 (1962). In addition, the court found the Zorach v. Clauson, 343 U.S. 306 (1952) and McCollum v. Board of Education, 333 U.S. 203 (1948) decisions inapposite to Chandler's position. Specifically, the court of appeals stated "these cases sup-

port no meaningful distinction between school authorities actually organizing the religious activity and officials merely 'permitting' students to direct exercises." (App. A, at A8). Such a conclusion is the result of an insensitive reading of facts of the cases cited therein by the court of appeals.

In McCollum v. Board of Education, 333 U.S. 203 (1948), a school board affirmatively required class periods of religious instruction lead by religious instructors. Such activity clearly runs afoul of the establishment clause. Similarly, in Engel v. Vitale, 370 U.S. 421 (1962) a school board affirmatively required daily classroom prayers. Engel therefore strengthens the holding that the establishment clause prohibits in-class prayers at the insistence of the state. Finally, a state mandated daily

bible reading violated the establishment clause in School District v. Schempp, 374 U.S. 203 (1963). The compulsory nature of the prayer in Schempp again lead to constitutional invalidity under the establishment clause.

An accomodation by the state of the students' right of free exercise as opposed to an affirmative requirement is, however, permissible. Zorach v. Clauson, 343 U.S. 306 (1952) illustrates that a threshold exists wherein accomodation of religious activity, as opposed to compulsion, is sanctioned by the first amendment. In Zorach, a weekly arrangement existed to release New York City students during school hours and permit the children to travel to religious centers for sectarian instruction. Those not released stayed in the classrooms. The Court declared the activity per-

missible for "the public schools do no more than accomodate their schedules to a program of outside religious instruction." 343 U.S. at 315. Benign accomodation as opposed to government mandate is the decisive factor, as the Zorach decision acknowledges, since the law regarding the religion clauses is one of degree, not absolutes. 343 U.S. at 314.

Chandler High School's accomodation of its student council through adjusting class schedules to permit voluntary assemblies closely approximates the countenance found in Zorach. The innocuous participation by the state pales next to the mandatory religious programs found in McCollum v. Board of Education, 333 U.S. 203 (1948); Engel v. Vitale, 370 U.S. 421 (1962); and School District v. Schempp, 374 U.S. 203 (1963). These school prayer

decisions are distinguishable to such an extent that reliance on them to disallow minimal prayer activity is misplaced.

Accomodation of the Chandler student council's activities is based soundly on the principle that the free exercise of religion may be impeded if accomodation by state officials is not forthcoming. The Zorach court anticipated the restrictions on the free exercise of religion as currently exist in the Chandler schools. "A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: God save the United States and this Honorable Court." 343 U.S. at 313. Mr. Collins should not be allowed to upset the reasonable accomodation made by the Chandler school officials. Indeed, the decision below illustrates the "preferring of those who believe in no religion over

those who do believe" that greatly concerned the Zorach court. 343 U.S. at 313.

The heart of the petitioners' claim is the significance of the voluntary nature of the assembly program. "Because there is no compulsion to attend, there is no coercion which would constitute an abridgement of the Free Exercise Clause." Wood v. Mount Lebanon Township School District, 342 F. Supp. 1293, 1295 (W.D. Pa. 1972). The Petitioners' claim must be tested by this Court's three-part test enunciated in Lemon v. Kurtzman, 403 U.S. 602 (1971). A state's regulation will not violate the establishment clause if (1) it has a secular purpose; (2) its principal or primary effect neither advances nor inhibits religion; and (3) it does not foster an excessive entanglement with religion. 403 U.S. at 612-13;

See Stone v. Graham, ____U.S. ____, 101 S.Ct. 840, 846 (1980); Committee for Public Education & Religious Liberty v. Regan, 444 U.S. 646, 653 (1980). The law regarding the religion clauses is composed of a calculus in which clearly permissible activity, such as providing fire protection, can easily be distinguished from manifestly proscribed activity, such as the government establishing a separate religion. Somewhere between the two extremes these instant facts lie. As discussed above, accomodation is permissible while compulsion is not. The Lemon decision sets forth a precise test with criteria, that when met, constitutionally protects the state's activity. The petitioner believes the court of appeals impermissibly raised the threshold required under Lemon for constitutional protection to the detriment of the free exercise of religion.

An unrestricted access to Chandler High School facilities by any and all student organizations "reflects a secular, and clearly permissible purpose--the encouragement of extra-curricular activities" Brandon v. Board of Education, 635 F.2d 971, 978 (2d Cir. 1980). Chandler High School previously permitted unrestricted access to the school facilities under the school's policy of benevolent neutrality. Now, under the weight of the permanent injunction, the students' access is narrowed and restricted.

The Lemon decision requires the principal or primary effect of a state's regulation neither advances nor inhibits religion. The pertinent portion of that test as applied here is the state's regulation cannot inhibit religion. This concept is forcibly put by a district

court decision which states, "[e]ach individual in society has the right to free exercise of his religion according to the dictates of his own conscience. There is a corresponding duty upon public authority as well as other individuals to recognize and respect that right in such a way that the individual is free from coercion of any kind." Reed v. Van Hoven, 237 F. Supp. 48, 52 (W.D. Mich. 1965). The school authorities met this duty through not interferring with the student council's activities. The accomodation by Chandler High School officials of permitting council members to pick students to lead a prayer at an optional assembly cannot be characterized as advancing religion in light of decisions such as Wood v. Mount Lebanon Township School District, 342 F. Supp. 1293 (W.D. Pa. 1972). Wood held that where a high

school's graduation ceremony was not compulsory, the practice of including an invocation and benediction by a clergyman did not violate the establishment or free exercise clause. The court reasoned that even though a clergyman, instead of a student, recited a prayer and benediction, the imprimatur of government was simply lacking. Indeed, "there is no governmental stamp of approval placed on the invocation and benediction to be said at the graduation ceremony. In fact, the content of the invocation and benediction is not and cannot be known at this point in time." 342 F. Supp. at 1294. The state's role, although characterized in the lower courts by Ms. Collins as advancement of religion, constitutes the lowest possible level of activity necessary to accomodate the student's activities. The lack of participation or

coercion on the part of the state is obvious and determinative. "[S]o long as government aid goes no further than arguably required by the [the accomodation] principle, there is no violation of the separation required by the establishment clause." O'Hair v. Andrus, 613 F.2d 931, 935 (D.C. Cir. 1979).

The prohibition against excessive entanglement, the third leg of the Lemon test, focuses on whether the state must engage in continuous administrative supervision of sectarian activity. Brandon v. Board of Education, 635 F.2d 971, 978 (2d Cir. 1980). The entanglement to be impermissible must be excessive since "for the men who wrote the Religion Clauses...the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity."

Walz v. Tax Commissioner, 397 U.S. 664, 668 (1970). The interdiction under the first amendment that government shall not establish or sponsor a religion is tempered in turn by its affirmative duty to protect the free exercise thereof. The focal point of balancing the natural tension between the establishment and free exercise clauses rests on the amount and type of state accomodation relating to religious exercises. In the instant case the court of appeals applied the establishment clause without addressing the contravailing policies underlying the free exercise clause. Chandler High School's role in declining to interfer with the student council's prayer plan cannot be construed as establishing religion. For example, the Eighth Circuit recently upheld regular student conducted religious services at the University of

Missouri since "there would be no active involvement of the sovereign because the University's role would be limited to determining the time, place and manner of the event and would not extend to approval or disapproval of content." Chess v. Widmar, 635 F.2d 1310, 1317 (8th Cir. 1980), cert. granted 101 S.Ct. 1345 (1981).

In light of the forementioned discrepencies concerning the religion clauses, the strength and validity of the free exercise clause and accomodation thereunder in relation to the establishment clause requires immediate resolution by this Court.

Moreover, religious speech, like other speech, is protected by the first amendment notwithstanding the court of appeals position to the contrary. That students have first amendment rights can-

not be disputed in light of Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969). The constitutional protection of freedom of religious speech as encompassed under the first amendment is found in Fowler v. Rhode Island, 345 U.S. 67 (1953) and Murdock v. Pennsylvania, 319 U.S. 105 (1943). "Similarly, the freedom to associate for the advancement of religious beliefs is no less protected than the freedom to associate for advancement of beliefs that are political, economic or cultural in nature." NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460-61 (1958). Yet, this forceful precedent is summarily dismissed by the lower courts in this case. The analysis presented by the lower courts requires the Chandler High School students leave their constitutional rights at the schoolhouse door.

The degree of protection accorded students' right of free speech regarding religion at school requires judicial resolution.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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July 21, 1981

APPENDIX A

Theresa M. COLLINS,
Plaintiff-Appellant,

v.

CHANDLER UNIFIED SCHOOL DISTRICT
et al., Defendants-Appellees,

Nos. 79-3297, 79-3319.

United States Court of Appeals,
Ninth Circuit.

Submitted Jan. 15, 1981.

Decided May 4, 1981.

TANG, Circuit Judge:

Theresa Collins, the parent of a student at Chandler High School, brought a section 1983 action to enjoin Chandler Unified School District (Chandler) from permitting voluntary prayer at school assemblies. The district court granted the injunction but denied Collins' request for attorneys' fees under section 1988 because her own civil rights were

not violated. Collins v. Chandler Unified School District, 470 F. Supp. 959, 964 (D.Az.1979). Collins appeals the denial of fees and Chandler cross-appeals the grant of a permanent injunction. We affirm the district court's decision enjoining Chandler officials, but reverse and remand the attorneys' fees questions.

I

Facts

The facts in this case are not in dispute. Chandler High School is a public school in Chandler, Arizona. Periodically during the year the Student Council plans and schedules student assemblies and the school administration adjusts the regular class schedule so that the assembly can be held within the school day. Student Council officers

conduct the assemblies and students not wishing to attend may report to a supervised study hall.

During the 1977-78 and 1978-79 school years, the Chandler Student Council requested permission to open assemblies with prayer. The principal approved these requests with the knowledge and concurrence of the superintendent and the Board of Education. In planning an assembly, the Student Council allotted a certain amount of time on the agenda and selected one member of the student body to say the prayer. The selected student was free to choose the manner and words in which the prayer was delivered. On each assembly day, the Council gave the principal an agenda which noted whether or not the gathering would be opened with prayer.

In the spring of 1978, Collins, a mother of two students then enrolled at Chandler High School, sought a legal opinion about the constitutionality of this practice. Deciding such prayers violated the first amendment, Collins' attorneys attempted to convince school officials to withdraw permission and terminate the prayers. The officials indicated, however, that they intended to continue the practice unless otherwise advised by the county attorney's office or ordered by the court.

When the county attorney advised Chandler officials that prayers at student assemblies were permissible and further agreed to represent the Chandler School District, Collins filed suit in dfstrict court seeking an injunction, a declaratory judgment, and attorneys' fees and expenses. The district court granted

summary judgment for Collins, finding that the conduct of the Chandler officials had violated the first and fourteenth amendments to the federal constitution; it issued an order permanently enjoining them from "permitting, authorizing, or condoning the saying of public prayers by the students" at student assemblies. 470 F. Supp. at 964. The district court denied Collins' request for attorneys' fees, however, and Collins appeals. Chandler cross-appeals.

II

Establishment Clause Violation

Chandler contends that granting students permission to open assemblies with prayer does not amount to a prohibited "sponsorship" of religious activity but is a reasonable accommodation of students' religious desires. In support

Chandler relies on the four major Supreme Court cases on prayer or religious instruction in public schools for the proposition that the benevolent neutrality required of state officials by the Free Exercise and Establishment Clauses can be achieved by allowing voluntary, student initiated religious activity. See School District of Abington Township v. Schempp, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963) (daily Bible reading and class recitation of prayer violated first amendment notwithstanding that students could be excused); Engel v. Vitale, 370 U.S. 421, 83 S.Ct. 1261, 8 L.Ed.2d 601 (1962) (daily denominationally neutral class recitation of prayer violated first amendment notwithstanding provision to excuse children); Zorach v. Clauson, 343 U.S. 306, 72 S.Ct. 679, 96 L.Ed. 954 (1952)

(releasing students to attend religious activities off school grounds constitutionally valid); McCollum v. Board of Education, 333 U.S. 203, 68 S.Ct. 461, 92 L.Ed. 649 (1948) (religious instruction conducted by clergy in classrooms during school hours violated first amendment notwithstanding ability to attend secular activities instead).

Collins correctly argues, however, that Chandler's permission for students to conduct prayers cannot be saved from constitutional attack merely because attendance at school assemblies is voluntary. As the Supreme Court stated in Engel, "[n]either the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of students is voluntary can serve to free it from the limitations of the Establishment Clause. . . ." 370

U.S. at 430, 82 S.Ct. at 1266. The court reiterated this principle in Schempp by citing Engel and stating that the religious exercises in question were not "mitigated by the fact that individual students may absent themselves upon parental request, for that fact furnishes no defense to a claim of unconstitutionality under the Establishment Clause." 374 U.S. at 224-25, 83 S.Ct. at 1572-73.

Moreover, these cases support no meaningful distinction between school authorities actually organizing the religious activity and officials merely "permitting" students to direct the exercises. In Goodwin v. Cross County School District No. 7, 394 F. Supp. 417 (E.D. Ark. 1973), the court directly addressed this question. There, as in the present case, a high school principal, with the concurrence of the

superintendent, granted permission for the Student Council to recite prayers and Bible verses of their choosing during the school hours. In holding the practice a constitutional violation, the court rejected "the contention that the establishment clause, as it interlocks with the free exercise clause, does not require the administration to deny the use of school facilities to the students who shall voluntarily and upon their own initiative, perform such religious exercises each day." 394 F. Supp. at 424. The court was "not persuaded that the responsibility of the School Board may be treated so lightly as the School Board insists, which amounts to a 'Hands-Off' attitude." Id.

Similarly, in Brandon v. Board of Education of Guilderland Central School District, 635 F.2d 971 (2d Cir.

1980), the Second Circuit recently upheld a school board's refusal to allow students to hold voluntary communal prayer meetings in a classroom immediately prior to commencement of the school day. In finding that a grant of such permission would have violated the Establishment Clause, the court applied the three part test enunciated in Lemon v. Kurtzman, 403 U.S. 602, 612-13, 91 S.Ct. 2105, 2111, 29 L.Ed.2d 745 (1971). That test establishes that a state regulation does not violate the Establishment Clause if (1) the enactment has a secular purpose; (2) its principal or primary effect neither advances nor inhibits religion; and (3) it does not foster an excessive entanglement with religion. Stone v. Graham, ___ U.S. ___, 101 S.Ct. 192, 193, 66 L.Ed.2d 199 (1980); Committee for Public Education & Religious Liberty

v. Regan, 444 U.S. 646, 653, 100 S.Ct. 840, 846, 63 L.Ed.2d 94 (1980); Brandon, at 978. We adopt the Brandon court's approach and reasoning.

Applying the Lemon v. Kurtzman test here, the invocation of assemblies with prayer has no apparent secular purpose and Chandler suggests none. Cf. Brandon, at 978 (neutral policy granting all groups access to school facilities reflects valid secular purpose of encouraging extracurricular activities). Second, the primary effect of such prayer appears to advance religion for the reasons given in Brandon. Citing McCollum, Schempp and Engel, and distinguishing Zorach, the court stated:

> Our nation's elementary and secondary schools play a unique role in transmitting basic and fundamental values to our youth. To an impressionable student, even the mere appearance of secular involvement in religious activities might

> indicate that the state has placed its imprimatur on a particular religious creed. This symbolic inference is too dangerous to permit.

Brandon, at 978.

Such secular involvement in religious activities in the institutionally coercive setting of primary and secondary schools, then, is alone sufficient to satisfy this prong of the Lemon v. Kurtzman test. Even so, the activity in our case goes beyond symbolic inference. The Chandler students must either listen to a prayer chosen by a select group of students or forego the opportunity to attend a major school function. It is difficult to conceive how this choice would not coerce a student wishing to be part of the social mainstream and, thus, advance one group's religious beliefs.

Finally, in Brandon the court found excessive entanglement despite the fact

that the prayer meetings were planned and conducted by students. The court reasoned that school officials had a duty to supervise all activities on campus and monitor the meetings to guarantee that participation would remain voluntary. Id. at 979; see Goodwin, 394 F. Supp. at 424. Likewise, in the present case the school assemblies required surveillance by school officials and, unlike the Brandon situation, probably involved attendance by faculty or administrators needing to supervise the obviously large gathering of students. Thus, under Brandon and Lemon v. Kurtzman, we hold that Chandler officials violated the Establishment Clause by granting permission for prayers during school hours.

Chandler argues, however, that denial of permission to open assemblies with prayer would violate the students'

rights to free speech. But, as the Brandon court persuasively explains, although students have first amendment rights to political speech in public schools, Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969), "[w]hen the explicit Establishment Clause proscription against prayer in the public schools is considered, the protections of political and religious speech are inapposite." 635 F.2d at 980 (citations omitted).

Chandler last urges that under Sherbert v. Verner, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963) (free exercise rights violated by denial of benefits to Seventh Day Adventists whose religion required observance of their sabbath), and Wisconsin v. Yoder, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15

(1[illegible]2) (insufficient state interest in compelling Amish children to attend school against religious tenets), denial of the right to begin assemblies with prayer would violate the students' rights to the free exercise of their religion. Again the Brandon court fully analyzes this argument and properly dismisses it. There, as here, the students wishing to pray during the day were not presented an absolute dilemma as were the individuals in Sherbert and Yoder. Unlike isolated members of the military forces, or public university students residing on campus, these high school students "are free to worship together as they please before and after the school day and on weekends in a church or any other suitable place." Id. at 977, citing Schempp, 374 U.S. at 299, 83 S.Ct. at 1612. Thus, as the Brandon court concludes, "the effect of

the school's actions . . . is hardly analogous to the coercive restraints on religious observation imposed by state action in Sherbert or Yoder." Id.

II

Attorneys' Fees

Collins contends that the district court improperly interpreted the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, to preclude an award of attorneys' fees to parent-plaintiffs who prevail against school authorities found to violate 42 U.S.C. § 1983. Chandler, on the other hand, argues that even though Collins had standing to sue, as a parent, Collins sought to vindicate only her child's civil rights and thus cannot claim fees.

Section 1988 provides that "[i]n any action or proceeding to enforce a provi-

sion of section . . . 1983 . . ., the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." "Congress plainly intended that successful plaintiffs 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.'" Sethy v. Alameda County Water District, 602 F.2d 894, 897 (9th Cir. 1979), cert. denied 444 U.S. 1046, 100 S.Ct. 734, 62 L.Ed.2d 731 (1980); see Aho v. Clark, 608 F.2d 365, 367 (9th Cir. 1979); Buxton v. Patel, 595 F.2d 1182, 1184 (9th Cir. 1979). "Implicit in this expression of congressional intent is a requirement that a court which denies an award of attorney's fees must issue findings of fact and conclusions of law identifying the 'special circumstances' and explain-

ing why they render an award unjust." Sethy, 602 F.2d at 897.

In this case, the district court simply held:

> Finally, as to plaintiff's request for attorneys' fees, defendants' reasons for objecting to these are found to be persuasive by this Court for the reason that plaintiff in this case, a student's mother, has not had her civil rights violated within the meaning of 42 U.S.C. § 1983, and is, therefore, not entitled to attorneys' fees pursuant to 42 U.S.C. § 1988 (1977 Supp.).

470 F. Supp. at 963-64.

The question, then, is whether Collins' status as a parent-litigant is a special circumstance sufficient to render an award unjust.

As Collins argues, the plain language of section 1988 provides no exception based on a litigant's status as a parent. The statute simply provides that in any action to enforce section 1983 rights the court may award fees to the prevailing party. The language "is broad and unequivocal", Dennis v. Chang, 611 F.2d 1302, 1305 (9th Cir. 1980), and must be liberally construed to achieve Congress' purpose to encourage compliance with and enforcement of the civil rights laws." Id. at 1306; see Leeds v. Watson, 630 F.2d 674, 677 (9th Cir. 1980); Mid-Hudson Legal Services, Inc. G & U, Inc., 578 F.2d 34, 37 (2d Cir. 1978).

Moreover, the practical effect of the district court's interpretation of section 1988 would, as Collins contends, deny fees to entire classes of prevailing plaintiffs. Nothing in the legislative

history indicates Congress intended such a consequence. See S.Rep. No. 94-1011, 94th Cong., 2d Sess., reprinted in [1976] U.S. Code Cong. & Ad. News 5908. To the contrary, Congress was surely aware that parents frequently sue in their own right to enjoin officials of their children's schools from violating section 1983 rights, yet it created no express exception to an award of fees. See Zorach v. Clauson, 343 U.S. at 309, 72 S.Ct. at 681; Adler v. Board of Education, 342 U.S. 485, 503, 72 S.Ct. 380, 390, 96 L.Ed. 517 (1952; Frankfurter, J. dissenting); McCollum v. Board of Education, 333 U.S. at 204, 68 S.Ct. at 462 (all cases in which a parent alone brought suit); cf. Dennis, 611 F.2d at 1305-06 (holding section 1988 fees available to legal services organizations, by arguing, inter alia, that Congress knew such organiza-

tions frequently were involved and failed to expressly exempt them.)[1] Therefore, we hold that an award of legal fees in this case would not violate the letter or spirit of section 1988. We remand to the district court to identify any other "special circumstances" and, if none are present, to determine a reasonable fee based upon such factors as those enumerated in Fountila v. Carter, 571 F.2d 487, 496 (9th Cir. 1978).

Affirmed in Part; Reversed and Remanded in Part.

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[1] Collins cites Mid-Hudson Legal Services v. G & U, Inc., 578 F.2d 34 (2d Cir. 1978), as a case in which a section 1988 award was made to a party seeking to vindicate the rights of others. In that case, however, the court held fees appropriate when, in addition to vindicating their own free speech and association rights, plaintiffs furthered a more general federal policy of assisting migrant workers.

In any event, it appears that, as a parent, Collins sued to vindicate a

direct, personal right. For example, in Adler v. Board of Education, 342 U.S. 485, 503, 72 S.Ct. 380, 390, 96 L.Ed. 517 (1952), Justice Franfurter, dissenting on other grounds, stated:

> An apt contrast is provided by [McCollum] . . . where a parent did present an individualized claim of his own that was direct and palpable. There the parent alleged that Illinois imposed restrictions on the child's free exercise of faith and thereby on the parent's. The basis of jurisdiction in the McCollum case was not at all a parental right to challenge in the courts - or at least in this Court - educational provisions in general. The closely defined encroachment of the particular arrangement on a constitutionally protected right of the child, and of the parent's right in the child, furnished the basis for our review (emphasis added).

See also School District of Abington Township v. Schempp, 374 U.S. at 224 n. 9, 83 S.Ct. at 1572 n. 9 ("parties here are school children and their parents, who are directly affected" by challenged religious exercises); Lee v. Nyquist, 318 F. Supp. 710, 713 (W.D.N.Y. 1970), aff'd, 402 U.S. 935, 91 S.Ct. 1618, 29 L.Ed.2d 105 (1971) (interest of parents, "for themselves and their children", is "both personal and direct").

APPENDIX B

Theresa M. COLLINS, Plaintiff,

v.

CHANDLER UNIFIED SCHOOL DISTRICT, Anna Marie Jacobson, Ben Ruoti, Lynn Jones, Edward Basha and Betty Bogle, in their capacity as members of the Board of Education of the Chandler Unified School District, James T. Perry, in his capacity as Superintendent of the Chandler Unified School District, and Howard T. Conley, in his capacity as principal of Chandler High School, Defendants.

No. CIV 78-741 PHX CAM.

United States District Court,

D. Arizona.

March 29, 1979.

OPINION AND ORDER

MUECKE, District Judge.

Theresa M. Collins, the plaintiff in this case, is a parent of a student presently attending the public high school in Chandler, Arizona.

As a part of the program of Chandler High School, assemblies of the student body are held periodically, including the current 1978-79 year, on the premises of the High School during regular school hours.

During the past two school years, the Chandler High School Student Council requested permission to open the student body assemblies with a prayer selected by a member of the student body picked by the Student Council. Such permission was granted by the High School Principal, Howard T. Conley, a defendant in this action, and various student assemblies were opened with such prayers.

Approval and permission for these prayers were granted by the School Principal with the knowledge and consent of the Superintendent of the District, James T. Perry, also a defendant, and by

all the members of the Board of Education of the District, also named as defendants.

All of the defendants have indicated that they intend to permit students to open student assemblies at the Chandler High School with prayers unless advised otherwise by the Office of the Maricopa County Attorney or this Court.

The Office of the Maricopa County Attorney has advised the defendants that they may allow the student prayers at assemblies to continue, and in fact that office is representing the defendants in this action.

The plaintiff mother, who is a resident within the boundaries of the Chandler Unified School District, located in Chandler, Arizona,[1] seeks to restrain the

---

[1] And as such, has standing to bring this suit. McCollum v. Board of Education, 333 U.S. 203, 68 S.Ct. 461, 92 L.Ed. 649 (1948).

defendants pursuant to 28 U.S.C. § 1343(4) from permitting, authorizing, or condoning prayers at student assemblies alleging such prayers to be in violation of the First and Fourteenth Amendments to the Constitution of the United States and of 42 U.S.C. § 1983, in that such conduct violates the prohibition against the governmental establishment of religion.

Plaintiff also requests a declaratory judgment pursuant to 28 U.S.C. § 2201 seeking to have this Court determine whether or not the Chandler School policy of allowing prayers to be said in a school with the knowledge, approval, or permission of the defendant school authorities also violates the First and Fourteenth Amendments of the Constitution.

Finally, plaintffff asks for costs, expenses, and pursuant to 42 U.S.C. § 1988 (Supp. 1977), for attorneys' fees.

Plaintiff and defendants seek to resolve these issues by way of cross-motions for summary judgment, the defendants simply requesting that a judgment be entered denying all the requests of the plaintiff, including the request for an injunction on the grounds that the conduct complained of is allowed under the First Amendment of the Constitution as free speech in that the prayers by the students are voluntary and do not constitute a governmental establishment of religion, and also that no attorneys' fees be allowed pursuant to 42 U.S.C. § 1988 (Supp. 1977) for the reason that there is no allegation in the complaint that plaintiff's civil rights have been violated, and plaintiff is not a student, nor is any student a named plaintiff.

Defendant has stipulated to all the facts as stated by the plaintiff, and reiterated in this opinion, so that this Court need only decide the significance these facts have in law pursuant to the cross-motions for summary judgment, there being no material issues of fact.

The parties have also agreed that the defendant, Chandler Unified School District, is a unified school district established pursuant to Title 15, Chapter 4.1, Article I of the Arizona Revised Statutes and is a political subdivision of the State of Arizona. They have further agreed that the defendant, School Board Members, are required by statute to prescribe and enforce rules for the government of the schools in the District, and the defendant, Conley, Principal of the Chandler High School, is responsible for carrying out the rules

prescribed by the Board as they pertain to the High School, and further that the defendant, Perry, Superintendent of the District, is employed by the Board pursuant to A.R.S. §§ 15-496 and 15-444(A)(1).

Prayers in the schools is a controversial issue, generating much heat without always concomitant light. It is a favorite of those who favor simplification of all issues, to those unaware or indifferent to the history of our Bill of Rights, or especially (in the context of this case) the Establishment Clause, and can have great appeal for the demagogue.

Ever since 1962 when the United States Supreme Court in Engel v. Vitale, 370 U.S. 421, 82 S.Ct. 1261, 8 L.Ed.2d 601, struck down any official school prayer imposed by school officials to be recited in public schools at the be-

ginning of each school day - even if the prayer is denominationally neutral and pupils who wished to do so might remain silent or be excused from the room while the prayer is being recited - a public controversy concerning the issue of school prayers has raged.

The High Court simply found such a practice to be wholly inconsistent with the Establishment Clause and it would be well to once again consider the reasons that they gave for this view in this decision.

> The petitioners contend among other things that the state laws requiring or permitting use of the Regents' prayer must be struck down as a violation of the Establishment Clause because that prayer was composed by governmental officials as a part of a governmental program to further religious beliefs. For this reason, petitioners argue, the State's use of the Regents' prayer in its public school system breaches the constitutional wall of separation between Church and State. We agree with that contention since we

think that the constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government.

It is matter of history that this very practice of establishing governmentally composed prayers for religious services was one of the reasons which caused many of our early colonists to leave England and seek religious freedom in America. Id. p. 425, 82 S.Ct. p. 1264.

* * *

It is an unfortunate fact of history that when some of the very groups which had most strenuously opposed the established Church of England found themselves sufficiently in control of colonial governments in this country to write their own prayers into law, they passed laws making their own religion the official religion of their respective colonies. Id. p. 427, 82 S.Ct. p. 1265.

* * *

By the time of the adoption of the Constitution, our history shows that there was a wide-spread awareness among many Americans of the

dangers of a union of Church and State. These people knew, some of them from bitter personal experience, that one of the greatest dangers to the freedom of the individual to worship in his own way lay in the Government's placing its official stamp of approval upon one particular kind of prayer or one particular form of religious services. Id. p. 429, 82 S.Ct. p. 1266.

* * *

The First Amendment was added to the Constitution to stand as a guarantee that neither the power nor the prestige of the Federal Government would be used to control, support or influence the kinds of prayer the American people can say - Id. p. 429, 82 S. Ct. p. 1266.

* * *

Under that Amendment's prohibition against governmental establishment of religion, as reinforced by the provisions of the Fourteenth Amendment, government in this country, be it state or federal, is without power to prescribe by law any particular form of prayer . . . Id. p. 430, 82 S.Ct. p. 1266.

* * *

It has been argued that to apply the Constitution in such a way . . . is to indicate a hostility

toward religion or toward prayer. Nothing, of course, could be more wrong. The history of man is inseparable from the history of religion. And it is not too much to say that since the beginning of that history many people have devoutly believed that "More things are wrought by prayer than this world dreams of." It is doubtless largely due to men who believed this that there grew up a sentiment that caused men to leave the cross-currents of officially established state religions and religious persecution in Europe and come to this country filled with the hope that they could find a place in which they could pray when they pleased to the God of their faith in the language they chose. And there were men of this same faith in the power of prayer who led the fight for adoption of our Constitution and also for our Bill of Rights with the very guarantees of religious freedom that forbid the sort of governmental activity which New York has attempted here. These men knew that the First Amendment, which tried to put an end to governmental control of religion and of prayer, was not written to destroy either. They saw rather that it was written to quiet the well-justified fears which nearly all of them felt arising out of an awareness that governments of the past had shackled men's tongues to make them speak only the religious thoughts that government wanted them to speak and to pray

> only to the God that government wanted them to pray to. It is neither sacrilegious nor antireligious to say that each separate government in this counrty should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance. Id. p. 433-435, 82 S.Ct. p. 1268-1269.

Defendants seek to distinguish this case and others by saying that the school authorities in this case have not acted to preclude the saying of prayers, and the prayers are not said in the classroom but in assemblies held on an irregular basis. "There is no indication," they say, "that the saying of the prayers poses a clear and present danger of bringing about a substantial evil which the government has the power to prohibit."[2]

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[2] Defendant's Motion for Summary Judgment. P. 7. (Defendants, however, cited no authority for this proposition).

They also contend that the prayers said at assemblies are voluntary, and are protected by the free speech provision of the First Amendment, and fall within the exception mentioned in Zorach v. Clauson, 343 U.S. 306, 72 S.Ct. 679, 96 L.Ed. 954 (1952) by Justice Douglas and dealing with prayers said in Congress, those said at the opening of each Supreme Court session and in legislative halls, and on occasion by the President.

Aside from the fact that such statements by Justice Douglas were dicta (that is not necessary to the decision on the facts presented in that case), the actual facts of that case involved religious activity not conducted by the school but away from the school under a released time program.

Here the prayers are taking place during school assemblies on public school property.

The claim of defendants that the prayer said is voluntary or that students can be excused from attending the assemblies was held to be immaterial by the U.S. Supreme Court in the Engels case where the Court said with respect to this same contention:

> . . . and the fact that the program, as modified and approved by the state courts, does not require all pupils to recite the prayer but permits those who wish to do so to remain silent or be excused from the room, ignores the essential nature of the program's constituional defects. Id. p. 430, 82 S.Ct. p. 1266.

And further:

> The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion . . . Id. p. 430, 82 S.Ct. p. 1267.

Here, while we do not have any direct governmental compulsion, we do have the

fact that the students are obliged to attend school[3] and that they did request permission from the defendant school authority to carry on their "voluntary" school prayer program in student assemblies. This is not to say that the constituionality of such a program need turn on the fact that permission was granted and given, because the saying of public prayers alone by students in a public school, whether directly or indirectly, sanctioned by the school authorities, violated the Establishment Clause in light of Engles and related cases[4] and the claim that such prayers

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[3] A.R.S. § 15-401 et seq.

[4] Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900 84 L.Ed. 1213 (1940), Abington School District v. Schempp, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed. 2d 844 (1963), Murdock v. Commonwealth of Pennsylvania, 319 U.S. 105, 63 S.Ct. 870 L.Ed. 1292 (1943), Everson v. Board of Education, 330 U.S. 1, 67 S.Ct. 504,

are a First Amendment free speech protected right is not valid. See Stein v. Oshinsky, 348 F.2d 999 (2nd Cir. 1965), cert. denied 382 U.S. 957, 86 S.Ct. 435 15 L.Ed.2d 361 (1965).

Finally, as to plaintiff's request for attorneys' fees, defendants' reasons for objecting to these are found to be persuasive by this Court for the reason that plaintiff in this case, a student's mother, has not had her civil rights violated within the meaning of 42 U.S.C. § 1983, and is, therefore, not entitled to attorneys' fees pursuant to 42 U.S.C. § 1988 (1977 Supp.).

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91 L.Ed. 711 (1947), Illinois Ex Rel. McCollum v. Board of Education, supra. Zorach v. Clauson, supra. McGowan v. Maryland, 366 U.S. 420, 81 St.Ct. 1101, 6 L.Ed.2d 393 (1961), Torcaso v. Watkins, 367 U.S. 488 81 S.Ct. 1680, 6 L.Ed.2d 982 (1961), Engel v. Vitale, supra. Goodwin v. Cross Country School District #7, 394 F. Supp. 417 (E.D.Ark. 1973).

Plaintiff's motion for summary judgment is granted as prayed for, insofar as it is the Court's findings and conclusions for the reasons herein stated that the defendants' conduct here complained of by the plaintiff is a violation of the First and Fourteenth Amendments to the Constitution and pursuant to 28 U.S.C. 1343(4).

IT IS ORDERED that the defendants herein, and their agents and successors, are permanently enjoined from permitting, authorizing, or condoning the saying of public prayers by the students of the Chandler Unified School District at the student assemblies at Chandler High School, Chandler, Arizona.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

THERESA M. COLLINS,	)	
	)	
Plaintiff-Appellant,	)	No. 79-3297
	)	79-3319
vs.	)	
	)	DC CV 78-741
CHANDLER UNIFIED SCHOOL DISTRICT, et al.,	)	CAM
	)	
	)	
Defendants-Appellees.	)	
	)	

APPEAL from the United States District Court of the District of Arizona (Phoenix).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Arizona (Phoenix) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District

Court in this Cause be, and hereby is affirmed in part, reversed and remanded in part.

Filed and entered May 4, 1981.

Office-Supreme Court, U.S.
FILED
AUG 24 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-138

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CHANDLER UNIFIED SCHOOL DISTRICT; ANNA MARIE JACOBSON, BEN RUOTI, LYNN JONES, EDWARD BASHA AND BETTY BOGLE, IN THEIR CAPACITY AS MEMBERS OF THE BOARD OF EDUCATION OF THE CHANDLER UNIFIED SCHOOL DISTRICT; JAMES T. PERRY, IN HIS CAPACITY AS SUPERINTENDENT OF THE CHANDLER UNIFIED SCHOOL DISTRICT; AND HOWARD T. CONLEY, IN HIS CAPACITY AS PRINCIPAL OF CHANDLER HIGH SCHOOL,

Petitioners,

vs.

THERESA M. COLLINS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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August 21, 1981

RESTATEMENT OF THE QUESTION PRESENTED FOR REVIEW

Whether officially sanctioned group prayer sessions in public primary and secondary schools during regular school hours violate the Establishment Clause as this Court held in *Engel v. Vitale*, 370 U.S. 421 (1962), and *School District v. Schempp*, 374 U.S. 203 (1963).

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Brandon v. Board of Education, 635 F.2d 971 (2d Cir. 1980) ..... *passim*

Chess v. Widmar, 635 F.2d 1310 (8th Cir. 1980), *cert. granted sub nom. Widmar v. Vincent*, 101 S. Ct. 1345 (1981) 14n

Collins v. Chandler Unified Schol District, 470 F. Supp. 959 (D. Ariz. 1979), *aff'd*, 644 F.2d 759 (9th Cir. 1981) ..... *passim*

DeSpain v. DeKalb County Community School District, 384 F.2d 836 (7th Cir. 1967), *cert. denied*, 390 U.S. 960 (1968) 14

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Goodwin v. Cross County School District No. 7, 394 F. Supp. 417 (E.D. Ark. 1973) 7, 8, 14

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Karen B. v. Treen, No. 80-4003 (5th Cir. Aug. 5, 1981) 6, 11, 12, 14

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NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958) 9n

Reed v. Van Hoven, 237 F. Supp. 48 (W.D. Mich. 1965) 12n

School District v. Schempp, 374 U.S. 203 (1963) .*passim*

State Board of Education v. Board of Education, 108 N.J. Super. 564, 262 A.2d 21 (1970) 10, 14

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No. 81-138

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CHANDLER UNIFIED SCHOOL DISTRICT; ANNA MARIE JACOBSON, BEN RUOTI, LYNN JONES, EDWARD BASHA AND BETTY BOGLE, IN THEIR CAPACITY AS MEMBERS OF THE BOARD OF EDUCATION OF THE CHANDLER UNIFIED SCHOOL DISTRICT; JAMES T. PERRY, IN HIS CAPACITY AS SUPERINTENDENT OF THE CHANDLER UNIFIED SCHOOL DISTRICT; AND HOWARD T. CONLEY, IN HIS CAPACITY AS PRINCIPAL OF CHANDLER HIGH SCHOOL,

Petitioners,

vs.

THERESA M. COLLINS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondent Theresa M. Collins respectfully prays that this Court refuse to issue a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit, entered on May 4, 1981.

RESTATEMENT OF THE CASE

A. *The Parties*

Respondent Theresa M. Collins, a parent of a student attending a public high school, brought this suit to enjoin group prayers conducted on school premises during school hours with the admitted knowledge, approval and permission of petitioner school authorities.*

B. *The Challenged Activities***

As part of its regular educational program, Chandler High School periodically conducted student assemblies on the premises of the high school during regular school hours. During the two school years prior to the filing of this lawsuit in 1978, and continuing until entry

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*The petitioners are Chandler Unified School District (the "District") and those persons charged with responsibility for prescribing and enforcing rules for governing the high school: the President of the Board of Education of the District (the "Board"), all members of the Board, the Superintendent of the District and the principal of Chandler High School.

**Petitioners' Statement of the Case contains numerous factual assertions contested before the district court and never established. In particular, the record does not establish petitioners' assertions regarding the supposedly "voluntary" [Pet. at 6], "optional" [*id.*] and non-"mandatory" [*id.* at 9] nature of the prayer sessions. Likewise, petitioners' allegations regarding the availability of a "supervised study hall" [*id.* at 2] as an alternative to attending a given assembly also is not established.

By contrast, each petitioner stipulated to every fact set forth herein.

More importantly, even under petitioners' version of the facts (*i.e.*, even if attendance at the prayer sessions had been "voluntary"), the challenged activity, under the decided cases, remains unconstitutional.

of the injunction, petitioners permitted group prayers to take place at the outset of many such assemblies. The high school principal, with the knowledge and concurrence of the Superintendent of the District and the Board, gave some students approval and permission to open the assemblies with such prayers.

C. *The Petitioners' Statutory Responsibilities*

Chandler is a unified school district established pursuant to Ariz. Rev. Stat. Ann. § 15-491 (1974) and a political subdivision of the State of Arizona. That statutory scheme requires petitioner school board members to prescribe and enforce rules for governing the schools in the district which the principal must carry out insofar as they pertain to the high school. *Collins v. Chandler Unified School District,* 470 F. Supp. 959, 961 (D. Ariz. 1979), *aff'd,* 644 F.2d 759 (9th Cir. 1981). Further, Ariz. Rev. Stat. Ann. § 15-442 (West Supp. 1980) provides that the Board shall "[m]aintain the schools established by them"; "[e]nforce the courses of study"; "[m]anage and control the school property within its district"; and "[p]rovide for supervision over pupils in instructional activities . . . and in noninstructional activities."

D. *The Decisions Below*

In granting respondent's motion for summary judgment on the merits and declaring the group prayers unconstitutional as a matter of law, the district court expressly relied upon this Court's decision in *Engel v. Vitale,* 370 U.S. 421 (1962), holding voluntary prayers in the public schools "to be wholly inconsistent with the Establishment Clause." 470 F. Supp. at 961. The court distinguished *Zorach v. Clauson,* 343 U.S. 306 (1952), as "involv[ing] religious activity not conducted by the school but away from the school under a released time program."

470 F. Supp. at 963. In the case at hand, as the court pointed out, "prayers are taking place during school assemblies on public school property." *Id.*

The court of appeals affirmed the district court's decision on the merits under the controlling authority of *Engel* and *School District v. Schempp*, 374 U.S. 203 (1963). The court rejected the "voluntary" prayer defense raised by petitioners and additionally noted that the applicable cases "support no meaningful distinction between school authorities actually organizing the religious activity and officials merely 'permitting' students to direct the [prayer] exercises." 644 F.2d at 761.

The Ninth Circuit expressly followed the reasoning of the Second Circuit in *Brandon v. Board of Education*, 635 F.2d 971 (2d Cir. 1980) (holding unconstitutional "voluntary" communal prayer meetings in the classroom prior to commencement of school), and applied the three-part test enunciated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Guided by *Lemon*, the court of appeals, concerned particularly with the "institutionally coercive setting of primary and secondary schools," determined that: (i) there was "no apparent secular purpose" to the assembly prayer sessions; (ii) "the primary effect of such prayer appears to advance religion"; and (iii) since the school officials had a duty to supervise "the obviously large gathering of students" at the school assemblies, the prayer sessions necessarily involved excessive entanglement of the state with religious activities. 644 F.2d at 762.

SUMMARY OF ARGUMENT

This Court should refuse petitioners' invitation to review this school prayer case for several principal reasons:

First, this Court has unequivocally declared that prayers in public schools, whether or not "voluntary," violate the Establishment Clause. There is no meaningful distinction between this case and those prior rulings.

Second, the state activity in this case runs afoul of the Establishment Clause under *Lemon v. Kurtzman* because: (i) there is no secular purpose to public school prayer sessions; (ii) the challenged conduct impermissibly advances the cause of religion; and (iii) endorsement of the petitioners' activities serves to foster excessive entanglement of the state in the supervision of religious activities.

Third, contrary to petitioners' unsupported assertion, there is absolutely no conflict between the opinion of the court of appeals and the long line of school prayer cases beginning with *Engel v. Vitale*, 370 U.S. 421 (1962).

REASONS FOR DENYING THE WRIT

I.

THE CHALLENGED ACTIVITIES ARE UNCONSTITUTIONAL UNDER THE DISPOSITIVE DECISIONS OF *ENGEL v. VITALE* AND *SCHOOL DISTRICT v. SCHEMPP*.

A. *Group Prayers in Public Schools, Whether or Not "Voluntary," Are Unconstitutional.*

Petitioners have offered no reason to retreat from the Court's prior decisions holding unconstitutional the same challenged conduct at issue here. *Engel v. Vitale*, 370 U.S. 421 (1962) (invalidating the practice of prayers in public schools as an unconstitutional violation of the Establishment Clause); *School District v. Schempp*, 374 U.S. 203 (1963) (classroom Bible readings offend the Establishment Clause).

Petitioners make much of the supposedly "voluntary," "optional" and non-"mandatory" nature of the prayer sessions at issue. [Pet., *passim*] In fact, petitioners concede that the "heart" of their claim is "the significance of the voluntary nature of the assembly program." [*Id.* at 11]

But petitioners ignore that this Court has unequivocally rejected that "voluntariness" argument. Thus, *Engel* held group prayers in public schools unconstitutional even though "[n]o student [was] compelled to take part" and "[p]rovision [was] also made for excusing children . . . from the saying of the prayer or from the room in which the prayer [was] said." 370 U.S. at 438. As the Court explained, "the fact that its observance on the part of the students is voluntary can[not] serve to free it from the limitations of the Establishment Clause" because it "ignores the essential nature of the program's constitutional defects." *Id.* at 430. Likewise, *Schempp* held Bible reading in schools unconstitutional notwithstanding "that individual students may absent themselves upon parental request." 374 U.S. at 224-25.*

Petitioners also ignore that the lower courts have consistently heeded these holdings regarding the immateriality of the "voluntariness" of the religious activities. *E.g., Karen B. v. Treen,* No. 80-4003, slip op. at 7 (5th Cir. Aug. 5, 1981) ("wholly voluntary" nature of school prayer program held "not relevant to the Establishment Clause inquiry"); *Brandon,* 635 F.2d at 978

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*Similarly, in Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203, 206 (1948), the only pupils participating in the condemned religious activity involved were those "whose parents consented" to their voluntary absence from their regular secular classes. No child was forced to receive religious instruction and, thus, the entire program was just as "voluntary" as that involved here.

("student-initiated voluntary prayer" violates the Establishment Clause).*

In short, petitioners' position, that any purported "voluntariness" somehow "distinguishes" this case, is seriously misleading and must be rejected on its face.

B. *That a Group of Students, Rather Than School Administrators, Composed the Prayers Is Immaterial Given the Admitted Approval and Supervision of the Prayer Sessions by School Officials.*

Petitioners seek to distinguish *Engel* and *Schempp* on the additional ground that the "prayer plan" [Pet. at 17] adopted in this case was supposedly "student-initiated" [*id.* at 6] as opposed to being a product of petitioners. That distinction has no basis in law.

First, school prayer cases have repeatedly rejected any purported "hands-off" attitude as a defense. *Brandon*, 635 F.2d at 978 (school facilities could not be used by student group called "Students for Voluntary Prayer" because even "an authorization of student-initiated voluntary prayer would have violated the Establishment Clause"); *Stein v. Oshinsky*, 348 F.2d 999, 1002 (2d. Cir.), *cert. denied*, 382 U.S. 957 (1965) (it is unconstitutional to "permit" "student-initiated" prayers); *Goodwin v. Cross County School District No. 7*, 394 F. Supp. 417, 423

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*Petitioners' reliance on Wood v. Mt. Lebanon Township School Dist., 342 F. Supp. 1293 (W.D. Pa. 1972), is misplaced. The *Wood* court expressly distinguished *Engel* by noting that the "graduation ceremonies" at issue were "ceremonial and [were] in fact not a part of the formal, day-to-day routine of the school curriculum to which is attached compulsory attendance." *Id.* at 1294. Moreover, unlike the situation present here and in *Engel*, there was "no governmental stamp of approval placed on the invocation and benediction to be said at the graduation ceremony." *Id.*

(E.D. Ark. 1973) (holding it unconstitutional for school principal to "grant[ ] permission" for challenged religious activities even though "the practices permitted . . . were performed through the auspices of the Student Council").

Second, petitioners here did more than passively survey the scene supposedly created by the student council alone. Indeed, in addition to scheduling and supervising the assemblies, they concededly approved and gave permission for the "prayer plan." [Pet. at 9; 644 F.2d at 762]

Third, petitioners' argument ignores that they have a statutory duty to "[m]anage and control the school property" and "[p]rovide for supervision over pupils in instructional activities . . . and in noninstructional activities" [Ariz. Rev. Stat. Ann. § 15-442 (West Supp. 1980)]. As a result of this statutory scheme, school authorities cannot hide behind the student council and evade the responsibilities it has to all the students. See *Brandon*, 635 F.2d at 979.

It surely makes no constitutional difference to the individual student that a student group rather than school authorities supposedly wrote or conducted the prayers. As the *Goodwin* court recognized, "[t]he fact that the practices permitted . . . were performed through the auspices of the Student Council, is begging the issue." 394 F. Supp. at 423.

C. *The "Religious Speech" and "Free Exercise" Rights of the Students Are Not Being Abridged by the Injunction Forbidding the Use of the High School as a Facility for Prayer Sessions.*

Petitioners urge that their activities amounted to a mere "[b]enign accommodation" [Pet. at 9] of "the students' right of free exercise" [*id.* at 8]. Similarly, peti-

tioners argue that the injunction prohibiting the implementation of the "prayer plan" in the high school abridges some students' rights to engage in "religious speech" [*id.* at 18].*

The courts have repeatedly denounced the activities involved here as unconstitutional notwithstanding any asserted "free exercise" rights of the students. *Schempp*, 374 U.S. at 225-26 (rejecting the contention that elimination of prayers in public schools was an interference with children's religious liberty under the Free Exercise Clause); *Stein v. Oshinsky*, 348 F.2d at 1001 ("[n]either [the Free Speech Clause nor the Free Exercise Clause] provision requires a state to permit persons to engage in public prayer in state-owned facilities"); *Hunt v. Board of Education*, 321 F. Supp 1263, 1266 (S.D. W. Va. 1971) (prohibiting prayers from being conducted on school property prior to opening of school did "not deny" "constitutional rights of freedom of speech, freedom of assembly or the free exercise of . . . religious beliefs").** Likewise, the "protections of political and religious speech" "are inapposite" when "the explicit Establishment Clause proscription against prayer in the public

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*None of petitioners' cited cases support that proposition. They either did not involve religious activities [Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969) (arm bands worn in war protest); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958) (disclosure of membership lists)] or did not address the issue of prayer in schools [Murdock v. Pennsylvania, 319 U.S. 105 (1943) (door-to-door distribution of religious tracts); Fowler v. Rhode Island, 345 U.S. 67 (1953) (sermons delivered in public park)].

**Zorach v. Clauson, 343 U.S. 306 (1952) (students permitted to leave school for religious activities conducted off school premises), cited by petitioners, is inapposite. As recognized by both courts below, *Zorach* involved no use of public school property and no religious activities took place at the school. 470 F. Supp. at 963; 644 F.2d at 761.

schools is considered." *Brandon*, 635 F.2d at 980. See also, *Stein v. Oshinsky*, 348 F.2d at 1001; *State Board of Education v. Board of Education*, 108 N.J. Super. 564, 262 A.2d 21, 32 (1970).

In sum, petitioners' argument ignores the teaching of these cases that a classroom is not a "public forum" where the performance of religious rituals may be permissible. *Brandon*, 635 F.2d at 980.

II.

THE CHALLENGED ACTIVITIES FAIL EACH OF THE THREE TESTS UNDER *LEMON v. KURTZMAN* FOR DETERMINING THE CONSTITUTIONALITY OF STATE ACTION.

As explained in *Stone v. Graham*, 101 S. Ct. 192, 193 (1980) (posting of Ten Commandments in schools held unconstitutional), an activity which fails to satisfy *any one* of the elements of the test set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), violates the Establishment Clause. The three *Lemon* requirements that petitioners must meet are as follows:

> "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . .; finally, the statute must not foster 'an excessive entanglement with religion.' "

403 U.S. at 612-13.

Here the group prayer sessions fail to meet *all three* requirements.

A. *There Is No Colorable Secular Purpose for Holding Prayer Sessions in Public Schools During Regular School Hours.*

The first element in the *Lemon* test requires petitioners to show that the activity involved has a secular purpose. 403 U.S. at 612. Petitioners cite dicta from *Brandon* (holding that a school board properly refused to permit communal prayer meetings on school premises) to suggest that prayer sessions are permissible to encourage "extracurricular activities." [Pet. at 13]

But there is nothing "extracurricular" about group prayers at official school assemblies, on school premises, conducted during hours—especially when state law requires all students to be in school and supervised by school officials. In fact, there is no conceivable secular educational purpose that can be furthered by praying during school assemblies:

> "Prayer is perhaps the quintessential religious practice for many of the world's faiths, and it plays a significant role in the devotional lives of most religious people. Indeed, since prayer is a primary religious activity in itself, its observance in public school classrooms has, if anything, a more obvious religious purpose than merely displaying a copy of a religious text in the classroom [a practice held unconstitutional in *Stone v. Graham*]."

Karen B. v. Treen, No. 80-4003, slip op. at 5 (5th Cir. Aug. 5, 1981).

B. *Recitation of Prayers During Official School Assemblies Impermissibly Advances Religion.*

Petitioners also fail to meet the second element of the *Lemon v. Kurtzman* test, that the activity involved does not have the effect of advancing religion.

The recitation of "an address of entreaty, supplication, praise, or thanksgiving directed to some sacred or divine spirit, being, or object," promotes religion "by encouraging observance of a religious ritual in the classroom." *Karen B. v. Treen*, No. 80-4003, slip op. at 6 (5th Cir. Aug. 5, 1981). Moreover, since school officials must, by statute, supervise these assemblies, the appearance of official support has the effect of advancing religion. *Brandon*, 635 F.2d at 979.

Petitioners' reliance on *Wood v. Mt. Lebanon Township School District*, 342 F. Supp. 1293 (W.D. Pa. 1972), is misplaced. In *Wood*, the district court held that a mere invocation by a clergyman at a high school graduation did not violate the Establishment Clause. 342 F. Supp. at 1294. High school graduation ceremonies, held outside normal school hours, attended by members of the general public and which occur only once a year, are manifestly different from scheduled school assemblies occurring on school property, during school hours on regularly scheduled school days. Accordingly, *Wood* does not alter the conclusion that conducting prayers at school assemblies has the necessary effect of advancing religion.*

C. *Petitioners Were Excessively Entangled in the Religious Activity.*

The third element of the *Lemon* test, that the activity not foster an excessive entanglement with religion,

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*Petitioners also cite Reed v. Van Hoven, 237 F. Supp. 48 (W.D. Mich. 1965). While clearly distinguishable because the religious activity occurred during nonschool hours and did not precede activities attended by the entire student body, the *Reed* decision has been criticized for its questionable legal analysis. Brandon, 635 F.2d at 979 n.9 ("[w]hile the outcome of the [*Reed*] case was questionable even in 1965, the Supreme Court's adoption of the entanglement test in 1969 . . . seriously undercuts the holding").

serves to avoid government involvement in religious activity. In the context of school activities, unconstitutional entanglement occurs when school officials are obligated by statute to monitor the prayer sessions. *Brandon*, 635 F.2d at 979.

The teachers and officials here responsible for governing the high school were entangled in the religious activities. Ariz. Rev. Stat. Ann. § 15-442.A.20 (West Supp. 1980) requires the Board to "[p]rovide for supervision over pupils in instructional activities . . . and in noninstructional activities . . . ."* Accordingly, the Board had a statutory duty to provide for supervision of the prayers by teachers or other school officials during the assemblies. Moreover, any purported system for excluding students from the assemblies [Pet. at 2] had to be implemented by school officials.

In sum, the prayer sessions fail to meet *every* test under *Lemon;* and failure to meet any one requires denial of the petition.

III.

THE NINTH CIRCUIT'S DECISION DOES NOT "CONFLICT" WITH THAT OF ANY OTHER COURT.

Petitioners allude to alleged "conflicts" [Pet. at 6] and "discrepancies" [*id.* at 18] between the Ninth Circuit's decision and those of other courts. In fact, however, since the landmark decisions of *Engel* and *Schempp*, every court facing the issue has declared prayer sessions in public primary or secondary schools during school

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*The Board must also "[e]nforce the courses of study" [Ariz. Rev. Stat. Ann. § 15-442.A.2 (West Supp. 1980)] and "[m]anage and control the school property within its district" [Ariz. Rev. Stat. Ann. § 15-442.A.8 (West Supp. 1980)]

hours and on school grounds unconstitutional. *Karen B. v. Treen*, No. 80-4003 (5th Cir. Aug. 5, 1981); *Brandon v. Board of Education*, 635 F.2d 971 (2d Cir. 1980); *DeSpain v. DeKalb County Community School District*, 384 F.2d 836 (7th Cir. 1967), *cert. denied*, 390 U.S. 960 (1968); *Stein v. Oshinsky*, 348 F.2d 999 (2d Cir.), *cert. denied*, 382 U.S. 957 (1965); *Goodwin v. Cross County School District No. 7*, 394 F. Supp. 417 (E.D. Ark. 1973); *Hunt v. Board of Education*, 321 F. Supp. 1263 (S.D. W. Va. 1971); *State Board of Education v. Board of Education*, 108 N.J. Super. 564, 262 A.2d 21 (1970).*

The cited cases uniformly condemn prayers in public schools as violative of the Establishment Clause. Thus, the opinions below are totally consistent with the decisional law.

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*Petitioners' reliance on Chess v. Widmar, 635 F.2d 1310 (8th Cir. 1980), *cert. granted sub nom.* Widmar v. Vincent, 101 S. Ct. 1345 (1981) (allowing certain religious activity on university campus), is misplaced. Even if decided correctly, *Chess* involved a university, not a public high school, where adult students who "rely on their college campus as their total community" would be forced to go off-campus for any religious observances. 635 F.2d at 1320. In fact, this is precisely the distinction relied upon by the Eighth Circuit in *Chess*, *id.* at 1319-20, and recognized by the Second Circuit in *Brandon*, 635 F.2d at 977 ("[a]uthorization for prayer at public universities . . . has been required because students both study and reside there. Frequently they are unable to hold prayer meetings off campus").

CONCLUSION

There is no occasion for this Court to belabor the obvious and restate the readily apparent law of the last twenty years. Accordingly, the Court should decline to review this case by writ of certiorari.

August 21, 1981.

Respectfully submitted,

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